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IN THE
Supreme Court of the United States

MICHAEL W. SOLE AND TERENCE COULLITTE,

Petitioners,

v.

T.A. WYNER AND GEORGE SIMON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

~~MOTION FOR LEAVE TO FILE AMICUS BRIEF AND~~
BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF RESPONDENTS

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MOTION AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3(b) of the rules of this Court, the Center for Individual Rights ("CIR") moves for leave to file a brief *amicus curiae*. Petitioners have not consented to the filing of a brief by CIR.

CIR is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to the First Amendment, especially those involving students in college and high school, including *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) and *McConnell v. Le Moyne College*, 808 N.Y.S.2d 860 (App. Div. 2006).

CIR believes that the standard set forth by petitioners and their amici would have a devastating and altogether inappropriate effect on student speech cases, which, by their nature, are prone to becoming moot when the plaintiffs graduate from school. The *Sypniewski* case is an excellent example of this phenomenon, and is described in detail below. Petitioners and their amici would deny "prevailing party" status to plaintiffs in student speech cases who "prevail" in any common or sensible use of that term. CIR submits this amicus brief to alert the Court to this consequence of petitioners' argument.[1]

STATEMENT OF THE CASE

CIR adopts the statement of the case provided by respondents.

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[1] Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

THE SYPNIEWSKI CASE

The incident that precipitated the *Sypniewski* lawsuit was Thomas Sypniewski's suspension for wearing a Jeff Foxworthy T-shirt to high school on March 22, 2001. The humorous T-shirt identified the "Top 10 reasons you might be a redneck sports fan." *Sypniewski*, 307 F.3d at 249-50. Thomas was suspended for violating the School's Dress Code policy, which prohibited, *inter alia*, clothing "portraying racial, ethnic, or religious stereotyping." *Id.* at 250 n.6. Thomas's brother, Brian, was a middle school student, and wore his Foxworthy t-shirt the day after Thomas was suspended. *Id.* at 251. Although no action was taken against Brian, when the Board of Education denied Thomas's appeal of his suspension, it stated that the failure to take action against Brian had been a mistake. *Id.*

Thomas and Brian, and their brother Matthew, commenced a lawsuit on June 25, 2001. At that time, Thomas already had graduated high school, Matthew had just completed his freshman year, and Brian was going to enter high school that fall. *Id.* at 246 n.1. At the same time that they filed the complaint, Matthew and Brian filed a motion for a preliminary injunction seeking to enjoin the application of the Dress Code, and a separate Policy On Racial Harassment And Intimidation (the "Racial Harassment Policy"), to the Foxworthy T-shirt. (The Racial Harassment Policy prohibited the wearing or possession of items "depicting or implying racial hatred or prejudice" or that "is racially divisive or creates ill will or hatred." *Id.* at 249.)

Defendants filed their brief in opposition to the preliminary injunction motion about six weeks later, on August 7, 2001, and oral argument was held on August 15, 2001. Docket in *Sypniewski v. Warren Hills Regional Bd. of*

Educ., D.N.J. Civ. No. 01-30614 (hereinafter "*Sypniewski* District Court Docket") (Doc. Nos. 12-14, 20); *Sypniewski v. Warren Hills Regional Bd. of Educ.*, Civ. No. 01-3061, slip op. at 1 (D.N.J. filed Sept. 4, 2001). The district court issued its opinion on September 4, 2001. The district court denied the motion for a preliminary injunction with respect to the Racial Harassment Policy and its application to the Foxworthy T-shirt, but held that the challenged parts of the Dress Code might not satisfy constitutional muster and suggested that it should not be enforced prospectively during the litigation. *Id.* at 2, 87. An order denying the motion for a preliminary injunction was entered on September 7, 2001. *Sypniewski* Dist. Ct. Docket, Doc. No. 22. Matthew and Brian filed their notice of appeal three days later. *Id.*, Doc. No. 23.

Matthew and Brian moved in the Third Circuit for a preliminary injunction pending appeal and expedited briefing on September 21, 2001. Docket Sheet in *Sypniewski v. Warren Hills Regional Bd. of Educ.*, Third Cir. No. 01-3542 ("*Sypniewski* 3d Cir. Docket"). In an order dated January 4, 2002, the Court of Appeals granted the motion to expedite the appeal (to which defendants had consented), but denied the motion for a preliminary injunction pending appeal. *Id.* Since the briefing was almost completed at that time, the motions panel ordered the matter to be listed before the next available panel. The appeal was argued before the Third Circuit on March 4, 2002. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d at 243; *Sypniewski* Third Cir. Docket.

Some 7 months later, on October 3, 2002, the Third Circuit issued its opinion reversing the district court in part. Specifically, the Court concluded that the District Court had erred in failing to enjoin application of the Racial Harass-

ment Policy to the Foxworthy t-shirt and failing to enjoin that policy to the extent that it permitted the regulation of speech that "creates ill will." *Sypniewski*, 307 F.3d at 269. The school board filed a petition for hearing and suggestion for rehearing en banc on October 17, 2002. *Sypniewski* Third Cir. Docket. The Third Circuit issued an order denying that petition on October 29, 2002, and mandate was issued on November 6, 2002. *Id.* The District Court entered a preliminary injunction based on the Third Circuit's opinion on November 25, 2002. *Sypniewski* Dist. Ct. Docket (Doc. No. 38). At that time, Matthew was a junior in high school and Brian was a sophomore.

The school board filed a petition for a writ of certiorari with this Court on January 27, 2003. Supreme Court Docket in *Warren Hills Regional Bd. of Educ. v. Sypniewski*, Sup. Ct. No. 02-1328. This Court denied that petition on May 19, 2003. *Warren Hills Regional Bd. of Educ. v. Sypniewski*, 538 U.S. 1033 (2003).

Upon return to the District Court, a discovery and scheduling order was issued. Plaintiffs moved for partial summary judgment on various claims on October 5, 2004. *Sypniewski* Dist. Ct. Docket, Doc. No. 50. Defendants did not oppose that motion to the extent it sought some word changes in the Dress Code and the striking of the words "ill will" in the Racial Harassment Policy. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, Civ. No. 01-3061, slip op. at 12-13 (D.N.J. filed Feb. 7, 2005). The court denied all of the rest of plaintiffs' motion for summary judgment, concluding, for example that there were issues of fact as to whether the Board had violated Thomas's rights when it suspended him for wearing the Foxworthy t-shirt. *Id.* at 13.

Matthew graduated from Warren Hills Regional High

School in June 2004 and Brian did the same in June 2005. They apprised the district court of this pursuant to their duty of candor, and, in November 2005, moved to dismiss voluntarily their remaining claims (including damages claims for Thomas, which he no longer wished to pursue). The district court granted that motion in January 2006. *Sypniewski v. Warren Hills Regional Bd. Of Educ.*, 2006 WL 208562 (D.N.J. Jan. 26, 2006).

The Sypniewskis then moved for attorneys' fees pursuant to 42 U.S.C. § 1988. The district court concluded that plaintiffs were "prevailing parties," focussing significantly on the fact that Matthew and Brian were able to wear the Foxworthy t-shirt to school because of the Third Circuit's judgment ordering the district court to issue a preliminary injunction. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 2006 WL 1675066, *6 (D.N.J. June 14, 2006).

In light of the arguments put forward by petitioners and their amici in this case, several points regarding the *Sypniewski* case deserve emphasis. First, the primary relief obtained was the ability of Matthew and Brian to wear the T-shirt to school without fear of punishment for racial harassment or insensitivity. The only other relief obtained was wording changes in the Dress Code and the Racial Harassment Policy. Second, although the district court did issue a "permanent injunction" with respect to those wording changes, it could easily have been otherwise. By the time the district court decided plaintiffs' motion for partial summary judgment, Matthew already had graduated and Brian's graduation was just a few months away. Had the district court delayed much longer, Brian's right to any permanent relief at all would have been moot as well. Alternatively, since defendants did not oppose plaintiffs' wording changes, they could have made the changes them-

selves and argued that an injunction was unnecessary. Third, the wording changes alone may not have been sufficient to justify a grant of fees under any circumstances. *Texas State Teachers v. Garland Ind. School Dist.*, 489 U.S. 782, 792 (1989) (although district court had concluded that prior approval requirement for nonschool hour meeting was unconstitutionally vague, "this alone would not have rendered them 'prevailing parties' within the meaning of § 1988"); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). Fourth, the preliminary injunction precluding defendants from applying the Racial Harassment Policy to the Foxworthy t-shirt was never made permanent. Despite that, Matthew received the benefits of the preliminary injunction for nearly two academic years, and Brian received its benefit for nearly three academic years. No permanent injunction could have done better for them.

SUMMARY OF ARGUMENT

This Court granted the petition for a writ of certiorari to answer the following question: Were plaintiffs here prevailing parties? Petitioners and their amici want to answer an entirely separate question: Do plaintiffs here deserve attorneys' fees? Petitioners' Brief ("Pet. Br.") at 40 ("There is no reason to shift fees in this case"); Brief of the United States as Amicus Curiae ("U.S. Br.") at 8 ("Fundamental fairness precludes imposing fee liability on a fully vindicated defendant"); *id.* ("Congress [did not] intend[] to saddle fully vindicated defendants . . . with attorney's fees . . . ."); *id.* at 19 (preliminary injunction proceedings do not permit the kind of consideration "needed to justify saddling the defendant with responsibility for attorney's fees"); Brief of National League of Cities, *et al.* ("NLC Br.") at 24 (Section 1988 "is not properly construed to award attorney's fees to plaintiffs who lose on the merits").

As this Court's precedents demonstrate, these are simply not the same questions. *E.g.*, *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) ("In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all").

In answering the question of who is a "prevailing party," petitioners and their amici argue that a fairly clear line needs to be established. We agree. But when the line to be drawn is only a *necessary* condition to entitle a plaintiff to attorneys' fees, and not a sufficient one, common sense suggests that it should be set at a fairly low threshold, as in *Farrar*. When so done, courts are easily able to adjust the amount of fees to which a prevailing plaintiff is entitled to take into account things like the permanence of the relief obtained or whether any "final" resolution of the merits was achieved. In contrast, the threshold set by petitioners and their amici is so high that it would preclude fees in cases where any reasonable observer would conclude that plaintiffs had both prevailed and obtained a judgment on the merits. *E.g.*, U.S. Br. at 20 n.11 (plaintiff that obtains a preliminary injunction followed by defendants' capitulation would not be a "prevailing party").

To obscure this problem, petitioners and their amici try to paint preliminary injunctions with a broad brush. Some of their observations may be true some of the time; but they are not always true, and there lies the rub. It may be true on *some* occasions that a preliminary injunction motion is heard on very short notice; but sometimes (as in *Sypniewski*) the preliminary injunction is not issued until appeal and after extensive briefing and careful analysis by the Court of Appeals. It is also no doubt sometimes true that a lower court does not make a very thorough analysis of the merits on a motion for temporary relief; but sometimes

(as in *Sypniewski*) courts engage in extensive and long analyses of the likelihood of success on the merits and the preliminary injunction determination depends entirely on that analysis. *Sypniewski*, 307 F.3d at 252; *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704, 709 (E.D. Va. 2000) (renown author entitled to a preliminary injunction, *inter alia*, requiring lesser-known author to have booksellers remove stickers that he had affixed to his books and to amend his personal website; standard for mandatory preliminary injunctions requires a showing of a "clear and convincing probability of success" such that "if there is doubt as to the probability of plaintiff's ultimate success, a request for preliminary mandatory relief must be denied" and well-known author "has met that burden by showing that she is virtually certain of success on the merits") (internal quotation marks and citations omitted). It also may be true that some preliminary injunctions last only a very short period of time; but others (as in *Sypniewski*) can last for years, as long as some so-called "permanent" injunctions last.

Petitioners' approach makes no sense at all. They suggest that if the plaintiffs in *Sypniewski* had entered into a consent order giving them the right to wear the Foxworthy t-shirt for one academic year, they would have been "prevailing parties"; but that having received a preliminary injunction that gave them the right to wear the same t-shirt for *three* academic years, they were not. They argue that a $1 nominal damages award is a "material" change in the legal relationship between the parties; but that a preliminary injunction that lasts for years is not.

Just like the nominal damages award in *Farrar*, considerations like the length of the injunction or the degree to which the merits were analyzed can be assessed by district courts to determine the amount of fees that are "reasonable."

But to lay down a bright line rule that would preclude any fees at all in cases where plaintiffs have received long-lasting relief based upon a thorough consideration of the merits -- indeed, where they have prevailed in every meaningful sense of the word -- would violate both Congress's understanding of the purpose of Section 1988 and fundamental notions of fairness.[2]

ARGUMENT

I. This Court's Precedents Demonstrate That Judicial Relief That Alters The Parties' Legal Relationship Is Sufficient To Attain Prevailing Party Status.

Petitioners and their amici take snippets of language from this Court's earlier cases in their effort to demonstrate that an order granting temporary relief is inadequate to form the basis for "prevailing party" status. They fail to take into account the context in which this language was used, and thus ignore the fact that most of their arguments based upon precedent cannot explain one or more of this Court's previous decisions. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) ("we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as thought they were the United States Code").

1. "Nothing in the language of § 1988 conditions

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[2] In this regard, we agree with petitioners that a line between various kinds of temporary relief -- *e.g.*, "status-quo" injunctions v. "merits-based" injunctions -- is difficult to draw and, more importantly, entirely unnecessary as a prerequisite to finding that a plaintiff is a "prevailing party." Pet. Br. at 24-25. The district courts can take these factors into account in determining the amount of a reasonable fee.

the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). In *Maher*, this Court specifically upheld the award of fees to a plaintiff who had obtained results by entry of a consent decree, despite the fact that the consent decree "[a]s is customary . . . did not purport to adjudicate respondent's statutory or constitutional claims." *Id.* at 126 n.8. As this Court explained in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 (2001), such "court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" (*quoting Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 488 U.S. at 792-93).

Thus, the various arguments by petitioners and their amici that a plaintiff is not a prevailing party unless (s)he has prevailed on the "merits" simply fails to take *Maher* into account. *E.g.*, Pet. Br. at 15; U.S. Br. at 8-10. Cases upon which they rely, like *Hewitt v. Helms*, 482 U.S. 755 (1987), involved situations where the plaintiffs achieved no alteration at all of the legal relationship between themselves and defendants, much less a "material" one.[3]

In fact, this Court's precedents have emphasized that the change in a legal relationship necessary to cross the "prevailing party" threshold is a low one:

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[3] So, too, both "common usage" and the legal definition of the word "prevailing" are inadequate to cover this Court's past precedents. *Cf.* NLC Br. at 11-12. Common usage would suggest that the plaintiff in *Buckhannon* did, and Mr. Farrar did not, "prevail." The technical legal definition of "prevailing party" would not usually include a plaintiff who enters into a consent decree in which the defendants do not admit wrongdoing or liability.

> A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA 1 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable.'

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). *See also Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. at 791-92. The only question in this case, then, is whether the plaintiffs' ability to engage in the peace protest they sought was a "significant issue" that achieved some of the benefit they sought in bringing the suit. Surely, it was.

Similarly, this Court has emphasized that a "material alteration of the relationship between the parties occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree or settlement against the defendant." *Farrar v. Hobby*, 506 U.S. at 113. There can be no dispute that an order granting a motion for a preliminary injunction is a "judgment." Rule 54(a), Fed. R. Civ. P. ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies"); 28 U.S.C. § 1292(a)(1) (courts of appeals have jurisdiction over appeals from orders granting injunctions). *See also, e.g., Financial Services Corp. of Midwest v. Weindruch*, 764 F.2d 197, 198 (7th Cir. 1985). A plaintiff that receives the benefits of a preliminary injunction can "enforce" that judgment to ensure compliance by the parties subject to it.

2. Petitioners and amici have two responses to these precedents. First, they suggest that there is a two-category standard for "prevailing party" status, the two more-or-less unrelated categories being those who have achieved a final judgment on the merits and those who have achieved a change in the legal relationship between the parties through a consent judgment. *E.g.*, Pet. Br. at 16; U.S. Br. at 11. Second, they suggest that the phrase "material alteration" must mean a "permanent" or "final" alteration in the parties' legal relationship. *E.g.*, Pet. Br. at 13; U.S. Br. at 21.

Petitioners and their amici proffer the suggestion that there are only two categories of plaintiffs who are prevailing parties so that they can distinguish a plaintiff who has procured a preliminary injunction from each. Accordingly, they insist that those plaintiffs who have not attained a court-ordered consent decree are not prevailing parties unless they were ultimately victorious in the lawsuit. But this Court has not created such rigid categories in its fee jurisprudence. Rather, court-ordered consent decrees and judgments on the merits entitle plaintiffs to "prevailing party" status because they meet the "generous formulation" that grants such status to all who have attained a material alteration in their legal relationship with the defendants. In *Buckhannon*, 532 U.S. at 605, this Court concluded that "the 'catalyst theory' falls on the other side of the line" from the judgment on the merits and the consent decree. That is, there is just *one* line (or standard), and not two, that distinguish judicial orders sufficient to justify "prevailing party" status, and those that do not. And *that* line obviously does not require a full-fledged assessment of the merits of the case for the simple reason that court-ordered consent decrees do not require much assessment of the merits at all.

Thus, petitioners and their amici must fall back on their second argument, *viz.*, that only a "final and enduring" (U.S. Br. at 24 n.14) alteration in the legal relationship is a material one. *Id.* at 7 ("enduring, material change"); NLC Br. at 8 ("success that is lasting"). But this argument creates a false dichotomy between the "permanent" relief of a consent-decree and the "temporary" relief of a preliminary injunction.

Nothing is forever, not even "permanent" injunctions (be they imposed with the consent of the parties or otherwise). For example, in *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991), this Court emphasized that school desegregation decrees "are not intended to operate in perpetuity," and a decree entered into with the consent of the parties would be no less subject to modification when circumstances warranted.

More importantly, consent decrees are frequently time-limited by their own terms. For example, in *EEOC v. Local 40, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 76 F.3d 76 (2d Cir. 1996), two intervenors sought in 1993 to have a union held in contempt for violating a 1980 consent decree. The consent decree emanated from a suit brought by the EEOC alleging discrimination against minorities and had sought to ensure that the union would take affirmative steps to ensure fairness and non-discrimination in hiring and referrals. It had a three-year expiration provision, but another provision stated that the union would be "permanently enjoined" from discriminating against minorities. *Id.* at 80. The Second Circuit held that the agreement had expired and that the district court had no jurisdiction to enforce it. It failed to perceive any ambiguity between the provision "permanently enjoining" the union and the three-year termination provision because "[j]udges often

use the word 'permanent' to distinguish post-litigation or post-settlement injunctions such as this one from the preliminary or temporary injunctions sometimes issued before full resolution of the merits." *Id.*

This Court has never held, nor would it make sense to hold, that only consent decrees that last more than a particular period of time are sufficient to bestow "prevailing plaintiff" status. On the other hand, as shown in the *Sypniewski* case, some preliminary injunctions can be quite long lasting. Thus, in many instances, the difference between consent decrees and preliminary injunctions is really much more a difference in degree than kind. It is most likely that, on the whole, consent decrees have a longer duration, although some are probably shorter in duration than many preliminary injunctions. On the other hand, preliminary injunctions, on the whole, probably involve a more serious judicial assessment of the underlying merits of plaintiffs' case than judicial approval of consent decrees. To suggest that one group (consent decrees) universally involves a "material" change in legal relationships while the other (preliminary injunctions) never does just ignores reality.

II. Petitioners' Standard Would Lead To Harsh Results

As if to emphasize the harsh results their theories would entail, both petitioners and their amici urge that plaintiffs who both receive the benefits of a judicially-sanctioned preliminary injunction and who obtain completely satisfactory results at the end of the litigation should nonetheless be denied prevailing party status. Thus, petitioners argue that those plaintiffs who obtain a preliminary injunction that becomes moot with the passage of time should be denied prevailing party status. Pet. Br. at 32-35. The United States argues that those plaintiffs who obtain a

preliminary injunction, and where the defendants then simply read the writing on the wall and give up, are not prevailing parties. U.S. Br. at 20 n.11.

1. Petitioners' argument seems to be based on several misunderstandings. First, it is entirely unclear what petitioners mean when they refer to the "mootness of an interim order" (Pet. Br. at 34) like a preliminary injunction order. *All* preliminary injunctions become "moot" at some point; that is the nature of *temporary* relief. A preliminary injunction "pending trial" or "pending appeal" will presumably be moot (and unappealable) after final judgment or the appeal. As such, this argument does not seem to be anything more than a reiteration that all preliminary injunctions are inadequate to justify prevailing party status.[4]

Petitioners also misunderstand this Court's precedents on vacatur. It is true that the extraordinary remedy of vacatur is sometimes appropriate when a final judgment becomes moot pending appeal -- albeit subject to the equitable exercise of the appellate court. *See U.S. Bancorp v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994) ("It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur"). But petitioners cite no case where this Court has held that a district court should vacate its own preliminary injunction if it becomes moot over time (which, of course, it always will). Indeed, petitioners' argument seems to be

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[4] Although, again, it is quite unclear, petitioners may be referring to cases where preliminary injunctions are issued and the underlying request for similar *permanent* relief becomes moot through the passage of time. Alternatively, they may be referring to preliminary injunctions that themselves become moot pending appeal of the order itself.

internally incoherent. Vacatur is designed to clear the path for future litigation where the losing party has been deprived of its right to appeal through no fault of its own. *Id.* at 22-23. But if, as petitioners argue, "the general rule is that a preliminary injunction lacks preclusive consequences," and "the doctrines of res judicata, collateral estoppel, and law of the case do not apply," Pet. Br. at 21, vacating an order granting a preliminary injunction serves no purpose at all, much less a purpose that justifies the "extraordinary remedy of vacatur." *Bonner Mall Partnership*, 513 U.S. at 26.

Thus, while vacated judgments cannot serve as a basis for attorneys' fees, petitioners are wrong to suggest that *all* preliminary injunctions should be vacated simply because of the passage of time. In *Sypniewski*, the district court entered a preliminary injunction after it was ordered to do so by the Third Circuit. That is, the defendants there already had had an opportunity to present their arguments to an appellate court (and subsequently filed a petition for writ of certiorari with this Court). The district court did not "vacate" its previous preliminary injunction order, and, it is hard to understand how it would have had the authority to do so given that its source was a superior court.

Ultimately, petitioners' argument is that wholly successful plaintiffs, who received the benefits of a judicially-ordered preliminary injunction for as long as they needed one, are not "prevailing parties." They further assert -- without explanation and in defiance of basic common sense -- that their position will not discourage plaintiffs with meritorious cases, but who seek relief over a short time horizon, from bringing their suits. Pet. Br. at 38. If the "common understanding" of "prevailing party" is at all relevant to this determination, it is surely difficult to justify

that outcome.[5]

2. Even harder to comprehend is the United States's argument that those who obtain a judicially-sanctioned preliminary injunction, and whose defendants then surrender so convincingly that a court concludes that no permanent injunction is needed, are *still* not "prevailing parties." U.S. Br. at 20 n.11. (Petitioners themselves seem less certain on this point. Pet. Br. at 38 n.21 (might discourage meritorious suits).) Again, this is hardly consistent with common sense, much less this Court's "generous

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[5] For this reason, respondent Simon prevailed in this case. The United States asserts that it is "doubtful" that respondent Simon has standing. U.S. Br. at 3 n.3. As a broad proposition, this is wrong. Standing is determined at the outset of the case, and the United States offers no reason why Simon did not have standing to challenge Florida's regulations prior to the peace protest on February 14, 2003. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180 (2000) ("we have an obligation to assure ourselves that [plaintiff] had Article III standing *at the outset of the litigation*") (emphasis added); *Worth v. Jackson*, 451 F.3d 854, 859-60 (D.C. Cir. 2006) (although challenge to employment policy was moot, because the challenged policy had lapsed, plaintiff nonetheless had standing because challenged policy "was in place when [plaintiff] filed suit and '[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.'") (*quoting Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). Simon also surely has standing to seek attorneys' fees and to defend the award of such fees on appeal. *Cf. Bonner Mall Partnership*, 513 U.S. at 390 (court is not powerless to award costs just because case became moot on appeal).

The United States has "confused mootness with standing." *Friends of the Earth*, 528 U.S. at 189. What it apparently means is that Simon's request for a permanent injunction to Florida's regulations became *moot* after February 14, 2003. That may well be true, but it only demonstrates that Simon obtained all the relief he possibly could have obtained from this litigation.

formulation" of the "prevailing party" standard. *Hensley v. Eckerhart*, 461 U.S. at 433.

Perhaps worst of all, the standard suggested by petitioners and their amici would give attorneys incentives to act contrary to the interests of their clients.[6] When a preliminary injunction is issued, and an attorneys' clients need it for a limited period of time, it is not in the clients' best interests to rush the case to trial.[7] Similarly, when clients have obtained a preliminary injunction, with perhaps a strong judicial hint that they will be successful on appeal, it is usually not in the clients' best interest to resist the defendants' complete surrender, if judged to be in good faith, by insisting upon a permanent injunction to which the defendants may be reluctant to assent.

Yet this is the result that petitioners and their amici

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[6] It is true, of course, that the right to statutory fees belongs to the client, and not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730-31 (1986). But, as this Court has noted, most attorneys take civil rights cases subject to fee-shifting statutes with the express understanding that the client will pay the attorney any fees that he receives pursuant to such a statute. *Cf. Venegas v. Mitchell*, 495 U.S. 82, 86 (1990) ("It is likely that in many, if not most, cases a lawyer will undertake a civil rights case on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won."). CIR's agreements with its clients usually incorporate such a provision.

[7] Nor is it always possible to do so. The United States repeatedly asserts that a plaintiff seeking a preliminary injunction who wishes to have a "full-blown merits determination may seek to do so under Federal Rule of Civil Procedure 65(a)(2)." U.S. Br. at 7. *Id.* at 19-20. The operative term, of course, is "seek"; there is no guarantee that a defendant will consent to, or a court will order, such relief. And, again, it may not be in the best interests of plaintiffs who believe that their case will become stronger through discovery to even make the request.

insist upon: giving attorneys incentives to work against their clients' best interests. There are a sufficient number of incentives for irresponsible attorney behavior without the law on "prevailing party" status adding to them.

CONCLUSION

Respondents are "prevailing parties." Petitioners failed to seek a review of any other issue related to the award of attorneys' fees, and, accordingly, the judgment of the court below should be affirmed.

Respectfully submitted,

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